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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 108

AARON BORIN, D/B/A WICHITA PACKING COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

Comes now the petitioner, Aaron Borin, doing business as Wichita Packing Company, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 5, 1954.

OPINIONS BELOW

The order of the District Court (R. 102) dismissing the complaint of the United States of America is unreported. The opinion of the Court of Appeals for the Fifth Circuit (R. 107-115) is reported at 209 F. 2d 145.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1954. Thereafter an enlargement of time was granted by the Court of Appeals for the filing of a petition for rehearing (R. 114). On March 8, 1954, the Court of Appeals entered an order denying the petition for rehearing (R. 143). The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTION PRESENTED

In establishing the livestock slaughter subsidy program pursuant to Section 2(e) of the Emergency Price Control Act of 1942, as amended, Congress provided that it should be administered "only" by the Reconstruction Finance Corporation (or by some other corporation created pursuant to the Reconstruction Finance Corporation Act). All these corporations have the authority to sue and be sued. The question presented is:

May the defense of a state statute of limitations be asserted in an action brought in the name of the United States of America for the recovery of subsidy payments made by the Reconstruction Finance Corporation in administering that program?

STATUTE INVOLVED

Section 2(e) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 50 USC App. Sec. 902e, provided that the Price Administrator might determine to buy or sell commodities or pay subsidies in order to achieve maximum production of those commodities. However, as to those commodities defined as strategic or critical pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, including livestock and meat, the Federal Loan Administrator, with the approval of the President, was authorized to make such determinations. When such determination is made by the Federal Loan Administrator with the approval of the President, the statute provided

that subsidies for such commodities were to be paid *only* by a corporation created or organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act.

The relevant portion of Section 2(e) of the Emergency Price Control Act of 1942, as amended, follows:

> "Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determination shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, *only* by corporations created or organized pursuant to such section 5d; . . ." (emphasis supplied)

STATEMENT

Petitioner is a beef slaughterer who, from 1943 to 1946 applied for and received payments from RFC under the livestock subsidy program established by Sec. 2(e) of the Emergency Price Control Act of 1942. The Act provided specifically that this program was to be administered "only" by the RFC or a similarly organized corporation. The program was administered first by the Defense Supplies Corporation and later by RFC. All of the petitioner's dealings were with these corporations. None was with the United States of America or with any other agency thereof.

In February 1953 this action was instituted, in the name of the United States, in the United States District Court for the Northern District of Texas, praying that court to declare that petitioner had violated an Office of Price Administration meat regulation during the period from June 1, 1943 to June 30, 1946, and for that reason to award respondent a money judgment for the amount of the live-

stock subsidy payments made to petitioner by the RFC during that period. The complaint was drawn in the language of the False Claims Act (R.S. 3490-3494, 31 USC Sec. 231 et seq.) and penalties and interest were prayed for in accordance with the provisions of that Act.

The gravamen of the complaint was that petitioner, in applying for the subsidy payments, had falsely certified to RFC during the period 1943-1946 that he was not in violation of meat regulations of the OPA. No allegation was made that petitioner had in any way appropriated subsidy monies for himself or that he had paid his livestock producers, the ultimate beneficiaries of the subsidy program, less than he claimed to have paid them.

The complaint was filed in the name of the United States although under the Price Control Act the RFC was made the exclusive administrator of the program and could have brought suit in its own name. The bulk of the record in this case consists of the voluminous regulations issued by the RFC to effectuate the purposes of the Act. No explanation was given for the long delay in asserting the claim or for the use of the name of the United States of America as plaintiff.

Petitioner moved to dismiss the complaint (R. 95) on the ground, here relevant, that the acts complained of occurred more than two years prior to the filing of the complaint and the action was therefore barred by the Texas Statute of Limitations.[1] The motion was granted (R. 102). The Court of Appeals reversed. It held that while the United States was barred by the six year limita-

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[1] Vernon's Texas Civil Statutes, Article 5526. "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

"4. . . . Actions for debt where the indebtedness is not evidenced by a contract in writing."

Under the law of Texas this section is applicable to a claim for common law deceit. *Quinn* v. *Press*, 135 Tex. 60, 140 S.W. 2d 438.

tion imposed by the False Claims Act (31 USC Sec. 235), it had pleaded sufficiently to sustain an action for restitution or common law fraud and that, because of its sovereign immunity, no state statute of limitations was applicable against the United States.

REASONS FOR GRANTING THE WRIT

As will be shown, the decision of the court below is in conflict with decisions of this Court and with decisions of the Courts of Appeals of the Third, Sixth and Tenth Circuits.

Section 2(e) of the Emergency Price Control Act delegates the subsidy program exclusively to the RFC or a similarly organized corporation. The record here presents squarely the issue whether, in an action brought to recapture monies paid under the program, a state statute of limitations is available as a defense. This was the issue raised by the motion to dismiss (R. 95).

There can be no doubt that if an action for restitution or for common law fraud (which the court below says the respondent is here asserting) were brought by a private individual, the statute of limitations would operate as a bar. It is only by reason of the doctrine of sovereign immunities that petitioner has been precluded from asserting that defense by the court below.

Whether the statute of limitations may operate as a bar must depend on an analysis of the applicable statutes (Section 2(e) Emergency Price Control Act and Reconstruction Finance Corporation Act) in the light of the prior decisions of this Court. The apparently arbitrary decision of the Attorney General to bring the action in the name of the United States, as was done here, rather than in the name of the Reconstruction Finance Corporation, as was done in *RFC* v. *Menihan Corp.*, 312 U.S. 81, cannot change the result.

The issue remains whether Congress intended the program to be administered outside the cloak of sovereign

immunities so that a state statute of limitations may be interposed.

This issue has never been decided by this Court.[2] However, in three relatively recent cases decided by this Court, certain principles have been enunciated which petitioner urges are dispositive of the issue here but which have not been adhered to by the court below.[3]

In the series of cases cited above, this Court has recognized that corporate instrumentalities of the government may be endowed by Congress with the government's immunities. However, the question is each time asked, "Has it done so?" In determining the answer to that question this Court holds that Congress will be presumed not to have endowed the corporation with immunities unless they are clearly granted. Congress intended that the government corporation be amenable to law.[4]

In arriving at its decision, the court below considered neither the applicable statutes nor the controlling decisions of this Court. Rather, it adopts the principle that a court should determine, without reference to statutory criteria, whether the corporation is performing a governmental function. If it is found (as the court did here) that the function is governmental, then, for purposes of litigation, the corporate instrumentality is to be treated as though it were an executive agency of the government.

To grant or deny a government corporation the mantle of sovereign immunities on the basis of such a test negates the authority of this Court in this important area.

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[2] But see *Bank of United States* v. *Donally*, 8 Pet. 361, which was decided on a conflict of laws question, i.e., whether the statute of limitations of Virginia or Kentucky applied as a bar. The question whether the Bank was entitled to the government's immunity was not discussed.

See also, Coffman, *Legal Status of Government Corporations*, 7 Fed. Bar Journ. 389, 401, 402.

[3] *Keifer & Keifer* v. *RFC*, 306 U.S. 381; *FHA* v. *Burr*, 309 U.S. 242; *RFC* v. *Menihan Corp.*, 312 U.S. 81.

[4] *Keifer & Keifer* v. *RFC*, *supra*, at pages 390, 391.

In two of the cases cited above, this Court had before it the Reconstruction Finance Corporation Act (the relevant portions are set forth in Appendix A) to determine whether that corporation was subject to suit or to an incident of suit, i.e., the assessment against the corporation of costs and allowances.[5] In both cases the decision was adverse to the corporation.

The Court considered the three cases because of the public importance of the issue in view of the increasing use by Congress of the corporate device. Petitioner respectfully suggests that the present case should be considered for the same reasons which impelled the Court to decide those cases.

Unless this Court decides the issue presented here, the decision below will stand as substantial authority for a proposition completely at variance with the principles established by a long line of cases culminating in *Keifer, Burr* and ***Menihan, supra.***

1. In establishing the subsidy program Congress did not endow the RFC with any of the government's immunities.

It has long been established that it is the doctrine of sovereign immunities which precludes the assertion of a statute of limitations against the government (*Gibson* v. *Chouteau*, 13 Wall. 92). The basis for immunity from the bar of a statute of limitations is identical with the basis for immunity from unconsented suit. To determine whether RFC, in the subsidy program, was endowed with immunities to protect it from a statute of limitations, the

[5] The Reconstruction Finance Corporation Act, as amended, is set forth in Appendix A. It is to be noted that, subsequent to *Menihan*, Congress granted several specific immunities to the corporation. It granted the government's immunity against costs and allowances (the issue in *Menihan*) and certain limited priorities in claims against debtor's estates. By endowing the corporation with these enumerated immunities only, it would appear clear that Congress intended the corporation to possess none other.

statute establishing that program must be construed. That analysis should be made within the purview of the criteria established by this Court, as indicated above, and "in line with the current disfavor of the doctrine of governmental immunity."[6]

Section 2(e) of the Emergency Price Control Act, which delegated *exclusive* authority to RFC, attempts to achieve maximum production of certain commodities considered essential to the war effort. It provided for a system of subsidies to accomplish this end. These subsidies were not gratuities but, in the area of livestock production, were made to compensate slaughterers who paid prices for livestock disproportionate to the lower fixed price allowed them on the sale of meat. (See *Illinois Packing Co.* v. *Bowles*, Emerg. Ct. App., 147 F. 2d 554; *Armour & Co.* v. *RFC*, Emerg. Ct. App., 162 F. 2d 918). It is estimated that RFC expended one and one-half billion dollars to effectuate the purposes of the Act.

At the time of the enactment of the Emergency Price Control Act, Congress was, of course, cognizant of the decisions of this Court in *Keifer, Burr* and *Menihan, supra.* When Congress determined that RFC alone should administer the program it had the alternative of designating an agency of the government which would

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[6] Chief Justice Hughes, writing for the Court in *Menihan*, said:

> "Starting from the premise indicated in the Keifer Case that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental immunity—we concluded that in the absence of a contrary showing 'it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.' Following that reasoning, the precise point of the decision was that the words 'sue and be sued' normally embrace all civil process incident to the commencement or continuance of legal proceedings and hence embraced garnishment as part of that process." *RFC* v. *Menihan, supra,* at pages 84, 85.

operate with the protection of sovereign immunity. Were this the intention, the selection of the Department of Agriculture would have been logical. (See *U.S. Dep't of Agriculture* v. *Remund,* 330 U.S. 539).

However, instead of employing an executive agency of the government to carry out its mandate, Congress chose an established corporate agent and directed that the corporation have exclusive authority to administer the program. If Congress desired the corporate agent to operate as though it were an executive agency of the government, it could have so directed. It did not. Under these circumstances, where Congressional intent is made clear, it is not for the courts to treat the corporation as though Congress had, instead, designated an executive agency.

Recently the question whether RFC, as administrator of the meat subsidy program, was clothed with governmental immunity was decided by the Third Circuit.[7] The opinion was written by Judge Maris, who, because of his position as Presiding Judge of the Emergency Court of Appeals, has had long, specialized experience in this field.

In that case, suit was brought against RFC for illegally withheld meat subsidies. The government argued as they do here, that because of the function served by RFC it was in the position of an executive agency of the United States and, therefore, immune from suit. The court, following the reasoning of *Menihan,* construed the applicable statutes to determine the intent of Congress. It found that Congress intended that the program be operated *exclusively* by the RFC and that it was the further intent of Congress that RFC should administer that program without the protection of governmental immunity. The government did not choose to petition this Court for a review of that decision.

The court below endows the corporation with an immunity which Congress did not intend. It imputes to

[7] *Riverview Packing Co.* v. *RFC,* 207 F. 2d 361 (1953).

Congress idiosyncratic and capricious conduct. Such an imputation has been proscribed by this Court.[8]

2. Importance of the issue.

The issue presented here is by no means limited to the statutes or to the facts involved in this case. It cuts across the entire field of government corporations. The corporate device continues and undoubtedly will continue to be employed by Congress. When Mr. Justice Frankfurter wrote the opinion in *Keifer* (1938), he noted forty such agencies. The last compilation (1950) shows forty-two (Government Corporation Control Act, 31 USC Sec. 846). The very fact that Congress felt it desirable in this Act to regulate the fiscal operations of government corporations is an indication of the permanency of the use of that device.

Recently the Attorney General has instituted a number of actions against beef slaughterers to recover subsidy monies paid them during the period 1943-1946. The latest of such suits was filed on April 28, 1954 in the United States District Court for the Southern District of California, Central Division. The suit is entitled, "United States of America v. Union Packing Co., *et al.*" (Civil No. 16729-WB). The complaint in this suit follows the theory of the complaint in the case at bar and prays for damages amounting to more than five million dollars including interest. The government apparently contemplates a number of similar suits. Because of the passage of many years since these subsidy monies were paid the defense of these suits is made extraordinarily difficult. Records have been destroyed in the ordinary course of business. Witnesses have dispersed or died. All of the weighty policy reasons lying behind the doctrine that there shall be an end to litigation apply with particular force in these lawsuits which, for no stated reason, have waited so long to be instituted. The government has for many years had

[8] *Keifer & Keifer* v. *RFC*, *supra*, at pages 393, 394.

knowledge of the basic facts upon which it will rely in order to prove the allegations of the complaints in these cases (R. 97-101).

Increasingly, the business community is compelled to deal with government corporations as distinguished from executive agencies of government. The assurance of this Court should be given the businessman that, many years after concluding a transaction with what he believes is an ordinary business entity like himself, he will not be confronted with an awesome sovereign against whom, for reasons buried in history, he may not assert a time bar.

3. The nominal party plaintiff.

Presumably the government feels that in instituting actions on behalf of a government corporation, the name of the plaintiff may at one time be "United States of America" and at another, the name of the corporation. There is no apparent rationale behind the choice in a particular case.[9] However, as in this case, the Attorney General apparently thinks that by using the name "United States of America" he is acquiring rights otherwise denied him if he entitled the matter "Reconstruction Finance Corporation, plaintiff." (cf. *RFC* v. *Foster Wheeler Corp.*, 70 F. Supp. 420 (S.D. Texas, 1947)). It is inconceivable that by merely shifting the names, the rights of the parties, fixed as they are by statute, can be changed. It cannot be argued, for example, that the result in *Menihan* would have been different if the name of the plaintiff had been changed to "United States." No "ritualistic formula" (*Keifer, supra*, at p. 389) can turn on or off the flow of sovereign immunities.[10]

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[9] Several District Court cases have been brought to recover monies paid by RFC. The name of the party plaintiff varies, e.g., *RFC* v. *McCarthy Bros.*, 117 F. Supp. 345 (1953) (N.D. Cal.); *RFC* v. *Foster-Wheeler Corp.*, 70 F. Supp. 420 (1947) (S.D. Tex.); the case at bar entitled *"United States of America*, plaintiff."

[10] See Coffman, op. cit., at p. 403.

Nor can a finding by a court that, in the particular circumstances, the corporate agent is fulfilling a governmental function be the basis for endowing the corporation with immunities. This reasoning involves a basic misconception of the relation of the government corporation to the government. In the sense that it does the government's work, every government corporation is the "government." The government is no "brooding omnipresence in the sky." It must operate through its agents. (See *Walder* v. *United States,* , U.S. , 98 L. ed. 278, 279, 280, where the Court says ". . . in the only way in which the government can do anything, namely, through its agents . . .") The question is what status has been conferred by Congress on those agents.

CONFLICTS

The precise issue presented here has never been decided by this Court. Nor has this issue been decided by the various Courts of Appeals with the exception of the court below.

Serious conflicts do exist among the Circuits in basic principle. Similarly, as has been shown, the decision below is in conflict with the decisions of this Court. If the decision below is allowed to stand, the principles enunciated by this Court in *Keifer, Burr* and *Menihan, supra,* will be seriously eroded. This Court has declared the doctrine of governmental immunity to be in disfavor and has limited strictly its application to government corporations; the decision below provides authority for the resurgence of this doctrine.

As shown above, the guiding principles most recently adopted by this Court in dealing with immunities attaching to corporate instrumentalities of the government are:

1. The doctrine of governmental immunity is in disfavor.

2. ". . . waivers by Congress of governmental immunities should be liberally construed in the case of federal instrumentalities . . ." *Menihan, supra,* 312 U.S. 81, 84, 85.

and, therefore

3. Unless Congress affirmatively endows a corporate instrumentality with the immunities of the government, it will be presumed that they are waived.

The court below did not apply these canons; it did not, apparently, even consider the pertinent decisions of this Court. Rather, it based its determination solely on its own evaluation of the nature of the function the corporation was performing. Because "The funds were Government funds and the loss was the Government's loss", the court held that RFC and DSC were "*mere* agencies of the Government to accomplish purely Governmental purposes" (emphasis supplied) (R. 112); and it concluded, on this theory, that since the corporation was doing the work of the government, it was entitled to the immunity of the sovereign against the assertion of time bars. It decided the case as though Congress had chosen the alternative, which it did not, of delegating the program to an executive agency.

In *Keifer, supra,* at p. 388, however, this Court said, "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work", clearly recognizing that, since all governmental corporations are agents created by Congress to do the government's work, this cannot be a valid distinguishing factor.

In like manner, the decision below conflicts with the decision of the Third Circuit in *Riverview Packing Co.* v. *RFC, supra.* The function served by the corporation in that case was identical with that in the case at bar. The Third Circuit also noted that the funds sought to be recovered were government funds (*Riverview, supra,* at p. 366). Yet that court, after construing the statute in the

light of *Menihan,* held that governmental immunities had been waived by Congress.[11]

The decision below conflicts, also, with that of the Sixth Circuit in *RFC* v. *Langham* (1953) 208 F. 2d 556. There the court held that RFC was shorn of the protection of governmental immunities. The decision was based on the authority of *Menihan, supra.*

To the same effect see *RFC* v. *Breeding,* 211 F. 2d 385 (1954), where the Court of Appeals for the Tenth Circuit held that RFC was subject to an Oklahoma statute providing for the time in which to enter deficiency judgments.[12]

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[11] At 207 F. 2d 367 the court said:

"The question of jurisdiction, therefore, comes down to whether Congress by section 2(e) of the Emergency Price Control Act intended to endow its corporate subsidy paying agents with governmental immunity from suit or whether on the contrary it intended that their corporate capacity to be sued should extend to their subsidy paying activities. This is a question of legislative intent which we must resolve since Congress did not deal with it expressly.[13] We think that there are sufficient indications that the latter was the Congressional intent. By section 2(e) Congress directed that subsidies should not be paid by Government officers, to whom immunity would apply, but exclusively by certain Government corporations which, as we have seen, were expressly authorized to be sued.

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[13] Federal Land Bank v. Priddy, 1935, 295 U.S. 229, 231; Keifer & Keifer v. R.F.C., 1939, 306 U.S. 381, 389."

[12] At pp. 389 and 390 the court said:

"The Finance Corporation is a corporation created by Act of Congress. All of its stock is owned by the United States. It is a wholly owned governmental agency with wide powers, and since its creation it has conducted financial operations on a wide scale. By express Congressional mandate, it has power to sue and be sued in any court of competent jurisdiction. But when acting as a litigant in a court of competent jurisdiction, it is not clothed with the prerogatives or immunity of the sovereign. *Keifer & Keifer* v. *RFC,* 306 U.S. 381; *RFC* v. *J. G. Menihan Corp.,* 312 U.S. 81."

Only the decision of this Court can reconcile the conflicts which have arisen.

CONCLUSION

The question presented by this case is one of great importance in the law applicable to government corporations. The issue has never been decided by this Court and there is a division of opinion among lower courts. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Tit. 15 U.S.C. Sec. 603:

". . . It shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease or purchase such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of the business of the Corporation, in accordance with laws, applicable to the Corporation, as in effect on June 30, 1947, and as thereafter amended; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted . . . The Corporation shall be entitled to and granted the same immunities and exemptions from the payment of costs, charges, and fees as are granted to the United States pursuant to the provisions of law codified in sections 551, 604, 751, 1913, 1914, and 1923 of Title 28. The Corporation shall also be entitled to the use of the United States mails in the same manner as the executive departments of the Government. Debts due the Corporation, whether heretofore or hereafter arising, shall not be entitled to the priority available to the United States pursuant to section 191 of Title 31 except that the Corporation shall be entitled to such priority with respect to debts arising from any transaction pursuant to any of the following Acts or provisions in effect at any time: . . ."

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the Northern District of Texas (R. 102), was entered without opinion. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 107–112) is reported at 209 F. 2d 145.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1954 (R. 113), and a petition for rehearing was denied March 8, 1954 (R. 139). The petition for a writ of certiorari was

filed June 3, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Whether a state statute of limitations may be applied against a claim of the United States because the public funds recovery of which was sought were disbursed by the Reconstruction Finance Corporation acting as agent for the United States under the Emergency Price Control Act.

STATUTE INVOLVED

The pertinent provisions of Section 2 (e) of the Emergency Price Control Act of 1942, 50 U. S. C. App. 902(e), are set forth in the Appendix, *infra,* pp. 12–13.

STATEMENT

In the course of economic stabilization during World War II, the ceiling prices of beef sold by slaughterers were reduced by the Price Administrator without a proportionate reduction in the prices of the livestock which the slaughterers purchased. To compensate the slaughterers for this differential, the Federal Loan Administrator instituted the Livestock Slaughter Subsidy Program under his authority (granted by the Emergency Price Control Act of 1942) to direct the payment of subsidies by corporations created under Section 5 (d) of the Reconstruction Finance Corporation Act, as amended, 55 Stat. 249, in such amounts and upon such terms and

conditions as he should determine to be necessary to obtain the required production of strategic or critical commodities. Section 2 (e), Emergency Price Control Act of 1942, 56 Stat. 23, 26, *infra*, pp. 12–13.[1] As the Livestock Slaughter Subsidy Program was an adjunct of price and distribution controls, the slaughterer had to comply with the regulations of the economic agencies of the Government in order to qualify for the subsidies. Because a great number of subsidy claims were made each month, it was not possible to check the validity of all claims immediately and at the same time pay them with the promptness necessary to enable the slaughterers to continue operations. As a result, the slaughterer was permitted to certify that his claim was accurate and that he had not willfully violated any regulation of the Office of Price Administration or the War Food Administration during the monthly reporting period covered by the claim. The Defense Supplies Corporation (DSC) was then authorized to approve these claims preliminarily, and to pay the subsidies.[2] If a claim was later found defective or if it was determined that the applicant had "wilfully violated any regulation * * *

[1] The history of this program is set forth in *Illinois Packing Company* v. *Reconstruction Finance Corporation*, 147 F. 2d 554 (Em. Ct. App., 1944).

[2] Defense Supplies Corporation, a subsidiary of Reconstruction Finance Corporation, was dissolved in 1945, by a joint resolution which transferred its subsidy administration functions to RFC. 59 Stat. 310.

applicable to the purchase or sale of livestock or to livestock slaughter, or to the sale or distribution of meat", DSC could declare those claims invalid and require restitution of the subsidy (D. S. C. Reg. No. 3, Sec. 10 (a), R. Ex. A, p. 8; Revised Reg. No. 3, Sec. 7003.10 (a), R. Ex. B, p. 9).

This action was brought by the United States to recover subsidies paid to the petitioner during the period from June 1, 1943 to June 30, 1946. The complaint (R. 1–5) alleged that the petitioner had not been entitled to these payments because he had sold beef above ceiling prices in each of the monthly periods for which he had filed a claim. The prayer asked for the damages, penalties, and forfeitures provided by the False Claims Act, 31 U. S. C. 231–235, and alternatively prayed for restitution of the sums paid to the petitioner. A motion to dismiss (R. 95) was made on the grounds that conditions necessary to the invalidation of subsidy claims had not been met by the Government, and that the action had not been brought within the time allowed by applicable statutes of limitations. The District Court granted the motion without stating its reasons (R. 102).

The Court of Appeals reversed (R. 107–112), finding causes of action stated under the False Claims Act, the Emergency Price Control Act, and for common-law fraud. Although it ruled the False Claims Act claim barred by the six year limitation period set forth in 31 U. S. C. 235—a

ruling which the Government has not sought to have reviewed—the Court of Appeals held that no statute of limitations applied to either of the other claims. The petitioner seeks a writ of certiorari in this Court on the ground that the two year Texas statute of limitations is applicable.

ARGUMENT

1. The claims of a wholly-owned Government corporation are claims of the United States, and suit upon such claims may be, and has often been, brought in the name of the United States. *Cherry Cotton Mills, Inc.* v. *United States,* 327 U. S. 536; *New Brunswick* v. *United States,* 276 U. S. 547; *Erickson* v. *United States,* 264 U. S. 246; *Clallam County* v. *United States,* 263 U. S. 341; *United States* v. *Lindsay,* 346 U. S. 568; see also *Defense Supplies Corporation* v. *United States Lines Co.,* 148 F. 2d 311 (C. A. 2), certiorari denied, 326 U. S. 746, and the lower court cases cited at 148 F. 2d at 312, fn. 3; *Insurance Co. of North America* v. *United States,* 159 F. 2d 699, 702 (C. A. 4).[3] For it is now established that—at least when Government monies are involved and the corporation is acting as the Government's agent—the United States is the real

[3] It is a common practice to enforce the Government's claims in the name of the United States itself, whatever the name or powers of the particular agency involved. See *United States* v. *Allied Corp.*, 341 U. S. 1, 5; *United States* v. *Remund*, 330 U. S. 539, 542–543; *United States* v. *Summerlin*, 310 U. S. 414.

party in interest and the loss is the Government's loss. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524; *Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, 275 U. S. 415, 424; *Southern Pacific Co.* v. *Reconstruction Finance Corp.*, 161 F. 2d 56, 59 (C. A. 9); and the cases cited above.[4]

It is a necessary corollary of these principles that no state statute of limitations can restrict the enforcement of such rights of a Government corporation, since these statutes are inapplicable to claims of the United States (*United States* v. *Thompson*, 98 U. S. 486; *United States* v. *Nashville, C. & St. L. Ry.*, 118 U. S. 120, 125, 126; *Board of Commissioners* v. *United States*, 308 U. S. 343, 351).[5] This is, in effect, the precise

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[4] This Court has continuously rejected efforts to differentiate between "governmental" and "commercial" activities of corporations created by the United States. See e. g., *Federal Land Bank of St. Paul* v. *Bismarck Lumber Company*, 314 U. S. 95, 102: "* * * when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."

Even if this distinction, which many courts have sought to draw, had any valadity, there can be no question that a Government corporation paying subsides as a part of the wartime program of economic controls is acting in a "governmental" capacity. Cf. *United States* v. *Allied Corp.*, 341 U. S. 1, 5.

[5] Cf. *Tennessee Valley Authority* v. *Kinzer*, 142 F. 2d 833, 837 (C. A. 6); *Posey* v. *Tennessee Valley Authority*, 93 F. 2d 726, 727 (C. A. 5): "Notwithstanding the corporate entity and its subjection to suit, the Authority is plainly a governmental agency of the United States, and except as Congress may otherwise consent, is free from state regulation or control."

holding of *United States* v. *Summerlin*, 310 U. S. 414. There, the Federal Housing Administrator had become the assignee of a defaulted note. This Court held that he had acted "on behalf of the United States," and that "the fact that the claim was acquired by the United States through operations under the National Housing Act does not take the case out of [the] rule" that the Government is immune from state statutes of limitations. While the Federal Housing Administration did not have corporate status, it was subject to suit, 49 Stat. 722, and the rationale of the *Summerlin* opinion exactly fits the instant case in which claims similarly accrued to the Government through an agent acting "on its behalf."[6] The financial procedures in each case further indicate their basic similarity. The funds of the Federal Housing Administration were supplied by the Reconstruction Finance Corporation, 48 Stat. 1246. The payment of meat subsidies by the Defense Supplies Corporation could begin only after an order of the Federal Loan Administrator. See Section 2 (e) of the Emergency Price

[6] Indeed, if there were any validity to the petitioner's contention that "the assurance of this Court should be given the businessman that, many years after concluding a transaction with what he believes is an ordinary business entity like himself, he will not be confronted with an awesome sovereign against whom, for reasons buried in history, he may not assert a time bar" (Pet. 11), it would have been even more pertinent in *Summerlin*. See the opinion of the Supreme Court of Florida in that case, 140 Fla. 475, 191 So. 842.

Control Act, *infra,* p. 13.[7] That in the one case the funds were disbursed directly through an executive agency and in the other by the government corporation itself, at the direction of the agency, should not suffice to create an inference of Congressional purpose to subject one group of payments to state law, while retaining full immunity for the other.

The subsidy program was an integral part of the maximum price system established for World War II by the Emergency Price Control Act of 1942. With the approval of this Court, the remaining enforcement of the other parts of that system is being carried on in the name of the United States and with its freedom from state restrictions. *United States* v. *Allied Corp.,* 341 U. S. 1, 5. There is no room in the statute or in the history of wartime controls to create an exception for this significant portion of the control system by subjecting subsidy enforcement, at this date, to the diverse statutes of the several states.

2. The decisions which the petitioner cites in his attempt to show a conflict in principle between the opinion below and the law as stated by this Court are inapposite. *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381, simply held the Regional Agricultural Credit Cor-

[7] Petitioner's statements at p. 8 that the Price Control Act "delegated *exclusive* authority to RFC" and that "Congress determined that RFC alone should administer the program," go beyond the statutes, since the law provided only that the payments must be made by the corporation.

poration liable to suit although its statute and charter were silent in this respect. *Federal Housing Administration* v. *Burr,* 309 U. S. 242, ruled that the agency's vulnerability to suit laid it open to garnishment proceedings. *Reconstruction Finance Corporation* v. *J. G. Menihan Corporation,* 312 U. S. 81, held the Corporation liable for costs in an action brought against it. The words of the *Burr* opinion concisely summarize the rationale of all three cases (309 U. S. at 245):

> * * * if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued", that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.
>
> Clearly the words "sue and be sued" in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings.

Thus, when Congress provides that a governmental instrumentality shall be subject to suit, it contemplates that the agency shall be liable not only to service and judgment but also to those judicial sanctions and procedures which ordinarily are incident to legal proceedings. But such consent does not imply any change in the law to be applied. This was clearly recognized by the Court when, less than a year after the *Burr* decision, it refused in the *Summerlin* case (as shown above) to apply a state statute of limitations to a claim of the Federal Housing Administration, a suable agency. The decisions of this Court have never supported the assertion that unless Congress affirmatively endows a corporation with the substantive immunities of the Government, it will be presumed that they are waived. On the contrary, the consistent position of the Court has been that these corporations are agents of the Federal Government and that "the true nature of these modern devices for carrying out governmental functions is recognized * * * when realities become decisive." *Inland Waterways Corporation* v. *Young,* 309 U. S. 517, 524.[8]

[8] See, for example, *McCulloch* v. *Maryland*, 4 Wheat. 316; *United States Grain Corporation* v. *Phillips*, 261 U. S. 106; *Emergency Fleet Corporation* v. *Western Union*, 275 U. S. 415; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477 ("When the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the govern-

The same principle was followed by the Third Circuit in a decision which the petitioner has cited (Pet. 13–14) as in conflict with the instant case. In *Riverview Packing Co.* v. *Reconstruction Finance Corporation,* 207 F. 2d 361, 370, that court held a suit maintainable against the Reconstruction Finance Corporation for subsidy payments, but denied any interest, saying:

> The defendant Reconstruction Finance Corporation does not stand in judgment in this case as a private corporation but rather as a paying agent for the Government of the United States charged with the responsibility of disbursing public funds to carry out a Government program, the payment of livestock slaughter subsidies. No provision of the subsidy regulations nor any statute or other Government regulation authorizes the payment of interest upon deferred subsidy claims. In the absence of such authority the district court was without power to impose interest upon the United States either directly or by judgment against its paying agent.

3. Even if the Texas statute of limitations might be applied to the claim based on common-law fraud, that statute is clearly inapplicable to the claim arising under the Emergency Price Control Act. That Act placed no limitation upon subsidy

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ment itself through its departments"); *Clallam County* v. *United States*, 263 U. S. 341; *New Brunswick* v. *United States*, 276 U. S. 547.

actions such as this, and the Emergency Court of Appeals has held that it contemplated that no limitation would obtain on the claim of a slaughterer for the payment of subsidies. *Taylor & Richards, Inc.* v. *Reconstruction Finance Corporation,* 193 F. 2d 877, 878–879. It is not conceivable that Congress would permit an indefinite time to the private claimant, and yet waive its own immunity and subject the claims of the Government to the statutes of limitations of the various states.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1954.

APPENDIX

The pertinent provisions of Section 2 (e) of the Emergency Price Control Act of 1942, 56 Stat: 23, 26, 50 U. S. C. App. 902 (e), are as follows:

> Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided,* That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such sec-

tion 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. * * *

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In the Supreme Court of the United States

OCTOBER TERM 1954

No. 108

AARON BORIN, D/B/A WICHITA PACKING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA.

Brief of Western States Meat Packers Association, Inc., as Amicus Curiae in Support of Petition for Writ of Certiorari.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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